

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Disposition of Down Payments and)	
Pending Applications Won During)	
Auction No. 35 for Spectrum)	WT No. 02-276
Formerly Licensed to NextWave)	
Personal Communications, Inc.,)	
NextWave Power Partners, Inc. and)	
Urban Comm – North Carolina, Inc.)	

**COMMENTS OF THE CELLULAR TELECOMMUNICATIONS
& INTERNET ASSOCIATION**

The Cellular Telecommunications & Internet Association (“CTIA”) hereby submits the following comments in strong support of the Commission’s proposal to allow Auction 35 applicants to apply for voluntary dismissal of individual applications and obtain a complete refund of down payments associated with those licenses.¹ As the Commission is well aware, the wireless telecommunications industry, along with the rest of the telecommunications industry, is currently facing a capital crisis that threatens thousands of jobs and the ability of telecommunications carriers to continue investment in new infrastructure. By allowing Auction 35 winning bidders maximum flexibility to decide whether to request voluntary dismissal of pending applications, allowing a full refund of applicable deposits and granting a full release from contingent liabilities that encumber billions of dollars of wireless assets, the Commission can inject new liquidity

¹ See *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications, Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc., Public Notice*, FCC 02-248 (rel. Sept. 12, 2002) (hereinafter “Notice”).

into the wireless telecommunications industry that will foster capital development, job creation and better service for consumers.

I. The Wireless Telecommunications Industry Currently Faces a Capital Crisis

There is no question that a serious financial crisis is currently affecting wireless service providers in the United States. On December 6, 2001, the market capitalization of the largest U.S. wireless service providers was approximately \$90.8 billion.² By October 1, 2002, the market capitalization of those providers had slumped to approximately \$24.5 billion.³ The dire state of the overall telecommunications industry was also recently noted by Chairman Powell, who stated that: “This is an industry suffering – there have been nearly 500,000 jobs lost, a reported \$2 trillion of market value extinguished, and by some estimates companies are laboring under nearly \$1 trillion in debt.”⁴

Unfortunately, the capital crunch in the wireless industry is compounded by the fact that numerous bidders in Auction 35 still have substantial sums on deposit with the Commission.⁵ In addition, Auction 35 winners are also currently saddled with a

² See JP Morgan, Mobile Metrics – Winter 2001 (Dec. 6, 2001). The JP Morgan market capitalization report includes the stock market capitalization of the following “pure” wireless companies: Airgate, Alamosa, AT&T Wireless, Centennial Cellular, Dobson Communications, Leap Wireless, Nextel, Nextel Partners, Rural Cellular, Sprint PCS, Triton PCS, UbiquiTel, US Cellular, US Unwired, US Cellular and Western Wireless.

³ Market capitalization data for October 1, 2002, was harvested by using CBSMarketwatch, available at <http://www.cbsmarketwatch.com>.

⁴ Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Goldman Sachs Communicopia XI Conference, New York, NY, Oct. 2, 2002.

⁵ In the Partial Refund Order, the Commission refunded portions of Auction 35 down payments, but required winning bidders to retain “on deposit three percent of the total net winning bids for licenses affected by the NextWave and Urban Comm

contingent liability of approximately \$16 billion, which must be paid within 10 days if and when the Commission receives court approval to reclaim the licenses from NextWave.⁶ This debt overhang dampens investment and threatens thousands of current jobs in the wireless industry, as well as future job creation.

II. The Commission Should Allow Selective Opt-Out for Pending Applications and Absolve Bidders of All Auction Liabilities

A. In Light of Current Financial Conditions, the Commission Should Allow Maximum Flexibility in the Opt-Out Process

The Notice requests comment on whether the Commission should allow Auction 35 winning bidders to cancel all pending applications and receive a full refund or allow bidders to selectively opt-out of specific license applications.⁷ In light of the range of different circumstances, CTIA urges the Commission to allow Auction 35 bidders maximum flexibility to decide whether to continue or cancel specific applications.

The wireless industry faces a capital crisis unlike any seen before in the industry. As detailed above, market conditions have changed radically since Auction 35 concluded in January 2001, making Auction 35 relief absolutely critical to the industry. A “one size

bankruptcies.” *Requests for Refunds of Down Payments Made in Auction No. 35, Order*, FCC 02-99 (rel. Mar. 27, 2002) (hereinafter “Partial Refund Order”). CTIA notes that, even after the “partial refund,” many carriers still have substantial amounts on deposit with the Commission. Verizon Wireless, for instance, currently has approximately \$261 million on deposit with the Commission. *See Another Telecom Fiasco*, WALL ST. J., Aug. 21, 2002, at A12.

⁶ See Partial Refund Order, at ¶ 2 (noting that the “net amount bid for those licenses in Auction No. 35 was approximately \$16.3 billion”); *see also C and F Broadband PCS Auction Closes; Winning Bidders Announced; Down Payments Due February 12, 2001, FCC Forms 601 and 602 Due February 12, 2001; Ten-Day Petition to Deny Period, Public Notice*, DA 01-211 (Jan. 29, 2001) (“Within ten business days after the [termination of the licensing pleading cycle], winning bidders will be required to make full payment of the balance of their winning bids.”).

⁷ Notice at 4-5.

fits all” approach, however, where wireless service providers are forced to either keep or cancel all pending applications as a package, does not fit this new economic climate.

Under these conditions, it is imperative that wireless service providers have the ability to deploy resources and infrastructure to critical areas as market conditions dictate.⁸

Accordingly, CTIA urges the Commission to adopt the “selective opt-out” proposal for pending Auction 35 applications.

B. The Commission Should Refund All Deposits to Bidders That Cancel License Applications

If a bidder elects to cancel all or some pending applications, the Commission should waive its default rules for dismissed license applications and allow a full refund of any deposits received, as well as cancellation of any debt incurred, for the cancelled applications. CTIA realizes that the Commission has had some concerns in the past that refunds of auction down payments could encourage “speculation,” and somehow damage the integrity of the overall auction process.⁹ CTIA submits that the Auction 35 situation is unique.

In other spectrum auctions the Commission was able to grant licenses to winning bidders, unlike the spectrum involved in Auction 35, which is tied up in the NextWave

⁸ See J. Gregory Sidak, THE ECONOMIC BENEFITS OF PERMITTING WINNING BIDDERS TO OPT OUT OF AUCTION 35, at 23-24 (Aug. 21, 2002) (hereinafter “Sidak Study”) (noting that much of the capital tied up in the Auction 35 deposits and “debt overhang” could be used for network infrastructure improvements).

⁹ *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16, 436, 16, 462 (1997) (hereinafter “C Block Second Report and Order”)(noting that forfeiture of deposits may discourage speculation in cases where the surrendered spectrum is reaucted on an expedited basis).

proceedings, and may never become available, or may not be available for years.¹⁰ In this situation, where the Commission is unable to perform its side of the bargain, it is manifestly unfair to hold deposits, interest-free, for licenses the Commission cannot grant at any time in the near future.

The unique factors underlying Auction 35 demand relief for carriers that placed good-faith bids with the expectation of receiving spectrum shortly after the auction closed. Accordingly, should the Commission adopt a plan allowing winning bidders either full or selective cancellation of their pending Auction 35 applications, CTIA urges the Commission to refund Auction 35 deposits as soon as possible after a bidder has elected to cancel some or all pending applications.

C. Auction 35 Bidders That Cancel Pending Applications Should Not Be Barred From Participating in Any Later Reauction of the Licenses

CTIA also believes that any bidders who opt-out of applications should be permitted to take part in future auctions for the same spectrum, should the ultimate resolution of the NextWave proceedings permit such a re-auction. Unlike other proceedings where the winning bidders have not taken or returned available spectrum, bidders in Auction 35 made deposits for spectrum that the Commission was not able to deliver due to the bankruptcy proceedings.¹¹ For many winning bidders, having substantial capital tied up as deposits combined with the unavailability of spectrum assets resulted in severe financial constraints completely beyond their control. In fact, most of

¹⁰ CTIA notes that the auction for the broadband PCS C block involved spectrum that was actually available, unlike Auction 35 where the spectrum cannot be immediately granted to winning bidders.

¹¹ See *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, 70 U.S.L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3351 (March 4, 2002) (Nos. 01-653, 01-657).

the winning bidders have incurred financial losses that would not have occurred but for their good-faith participation in Auction 35.

Because it is the Commission that is not able to perform its side of the contract – by delivering the licenses to the winning Auction 35 bidders – and not the bidders who have defaulted on their obligations to the Commission, it would be inequitable to punish carriers who decide to opt-out of their Auction 35 bids by preventing them from bidding on the spectrum again, if and when that spectrum actually becomes available.

Accordingly, due to the unique factors involved with Auction 35 and the overhanging NextWave litigation, CTIA urges the Commission to allow bidders who dismiss Auction 35 applications to participate in any subsequent auctions involving the same spectrum.

III. The Commission Has the Legal Authority to Cancel the Applications and Refund Deposits

The Notice also requests comment on whether cancellation of the Auction 35 applications would meet the requirements of Section 309(j) of the Act, which provides authority to the Commission to conduct spectrum auctions.¹² CTIA strongly believes that the selective opt-out alternative combined with a full deposit refund for cancelled applications fully comports with Section 309(j) and is the only option that provides a fast capital infusion for the industry, allowing wireless service providers to upgrade and expand their networks to meet the needs of consumers and serve the public interest. This approach is well within the Commission’s legal authority.

Section 309(j)(3) states that in designing the “competitive bidding system,” the Commission “shall include safeguards to protect the public interest in the use of the

¹² Notice at 5.

spectrum.”¹³ This “public interest” component is further defined in Section 309(j)(3)(A), which states that the auction process must foster “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, *without administrative or judicial delays*.”¹⁴ In the case of Auction 35, winning bidders have been deprived of both the deposits they placed with the Commission and the use of capital encumbered by their overhanging contingent liability, as well as the actual licenses. Since the NextWave proceedings will likely continue for the foreseeable future,¹⁵ during which time the licenses cannot be provided to winning bidders, CTIA believes the best way to serve the command of Section 309(j)(3)(A) is to offer winning bidders the selective opt-out option and thereby allow carriers to invest the capital frozen in Auction 35 to better serve the public interest.

The Commission has followed this course before, and absolved winning bidders of liability, except for certain deposit monies, in two previous auctions. After the original auction of PCS spectrum in 1997, the Commission agreed to absolve certain carriers of

¹³ 47 U.S.C. § 309(j)(3).

¹⁴ 47 U.S.C. § 309(j)(3)(A).

¹⁵ In addition to the case currently pending before the United States Supreme Court, there are also other cases involving the NextWave licenses pending before the courts and the Commission. *See, e.g. Cellco Partnership d/b/a/ Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002); *Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave Personal Communications, Inc. and NextWave Power Partners Inc. to Hold C and F Block Licenses*, filed by Alaska Native Wireless, L.L.C., Verizon Wireless, and Voicestream Wireless Corporation (dated July 19, 2001); *Petition for Reconsideration* filed by Alaska Native Wireless, L.L.C. and Voicestream Wireless Corporation (dated Oct. 12, 2001); *Petition to Deny Reinstatement of Licenses* filed by Alaska native Wireless, L.L.C. and Voicestream Wireless Corporation (dated Aug. 30, 2001).

liability after certain carriers faced financial difficulties.¹⁶ This relief was upheld subsequently by the United States Court of Appeals for the District of Columbia Circuit.¹⁷ Relief was also granted in 1999, following the auction of spectrum to be used for “Instructional Video Display Service,” or interactive television.¹⁸ In this case, the Commission again let winning bidders surrender licenses that had not yet been paid for and absolved bidders of liability.¹⁹

In both cases, absolution of liability occurred as a result of financial difficulties affecting certain carriers and segments of the industry, and involved spectrum that was immediately available for licensing to the winning bidder. In addition, the Commission considered granting complete refunds in both cases, but declined to refund all deposits due to concerns over “speculation” that could occur due to a rapid re-auction of the affected spectrum. In this case, however, the Auction 35 spectrum is simply not available. Therefore, there is little risk that bidders who are absolved of liability will engage in “speculation” because the spectrum remains unavailable, and will probably remain unavailable for a substantial period of time. Accordingly, in the present case, absolution combined with a complete refund of deposits for cancelled application is the only fair and equitable option.

¹⁶ See C Block Second Report and Order, 12 FCC Rcd at 16436.

¹⁷ See *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227 (2000).

¹⁸ See *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Report and Order*, 15 FCC Rcd 1497 (1999).

¹⁹ See *id.* at ¶ 50 (allowing bidders to choose either a “selective” opt-out option or complete amnesty for all license applications).

IV. The Release of Auction 35 Liabilities Will Spur Significant Economic Growth and Create Thousands of New Jobs

There is no question that the wireless industry is currently experiencing very trying financial times. While the cancellation of Auction 35 liabilities will not cure these financial difficulties, it will provide a substantial infusion of much needed capital through the refund of remaining deposits and the release of contingent liability.

According to a recent study, the release of the \$16 billion in potential debt would increase the U.S. gross domestic product (“GDP”) by between \$19 and \$52 billion.²⁰ This increase in GDP, in turn, will spur the creation of thousands of jobs. Furthermore, in addition to the pure economic benefits inuring from the cancellation of liability and refund of deposits, it is likely that Auction 35 relief will also spur investors who have shied away from the industry due to the “debt overhang” problem. In a declining market, investors generally shy away from any sectors with even some degree of future uncertainty. By refunding Auction 35 deposits and removing contingent liability, the Commission can reduce some of the investment risks confronting the wireless industry. This, in turn, will result in additional capital for the wireless industry, its vendors and the public they serve.

²⁰ See Sidak Study, at 4 (“The combined effects of this additional spending would be to increase U.S. GDP by between \$19 billion and \$52 billion, \$12 billion to \$38 billion of which would occur by the end of 2005 versus waiting until after 205 and getting the delayed benefits of Auction 35, if at all.”)

CONCLUSION

The Auction 35 deposits and contingent liability are nearly as large as the current market capitalization of the largest wireless carriers and are threatening the industry's continued growth and investment. By refunding the Auction 35 deposits and allowing wireless carriers to opt-out of pending applications, the Commission can take a major step toward resolving the current capital crisis impacting the wireless industry. Accordingly, CTIA urges the Commission to act as soon as possible to allow Auction 35 bidders to opt-out of affected license applications, refund all deposits, and remove the contingent liability associated with cancelled applications.

Respectfully submitted,

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